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This issue contains:

U.S. Court of International Trade

Slip Op. 85–66 Through 85–70

Protest Abstracts P85/130 Through P85/148

Reap Abstracts R85/257 Through R85/289

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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Decisions of the United States Court of International Trade

(Slip Op. 85–66)

SACILOR, ACIERIES ET LAMINOIRS DE LORRAINE, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 85–5–00664

VALLOUREC, PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 85–5–00669

Before: RESTANI, *Judge.*

OPINION AND ORDER

[Judgment of dismissal.]

(Decided June 21, 1985)

Donovan, Leisure, Newton & Irvine (*Pierre F. de Ravel d'Escalapon, Thomas R. Trowbridge, III,* and *Melvin S. Schwechter*) for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Velta A. Melnbrencis,* Civil Division, United States Department of Justice, for defendants.

Stewart & Stewart (*Eugene L. Stewart* on the brief) for *amicus curiae* Bethlehem Steel Corporation.

RESTANI, *Judge:* Plaintiffs, European manufacturers of made-to-order steel pipes for crude oil pipelines, filed these actions to challenge a Department of Commerce (DOC) determination. The determination denied a request by the European Economic Community (EEC) to allow the importation into the United States of additional quantities of pipe beyond the level specified in an agreement between the EEC and the United States. Plaintiffs moved for expedited discovery and briefing. Defendant United States government opposed the motion and requested briefing on several threshold questions including jurisdiction, standing, justiciability, and judicial review. After briefing and oral argument, the court has determined the plaintiffs failed to state a cause of action under the substantive law and that judicial review of the findings of the DOC is unavailable.

I. BACKGROUND

In September, 1984, plaintiffs executed final contracts with the All American Pipeline Company to supply specially made pipe for a project designed to transport crude oil from California to the Gulf Coast. Plaintiffs were selected as suppliers after an open bidding process. On October 30, 1984, the Trade and Tariff Act of 1984, Pub. Law 98–573, 98 Stat. 2948 was enacted. Included as Title VIII of the 1984 Trade and Tariff Act was the Steel Import Stabilization Act (SISA), 19 U.S.C.A. § 2253 note (West 1980 & Supp. 1985). Section 805(b) of SISA grants power to the Secretary of Commerce (Secretary) to insure that the quantities of imported pipes and tubes remain in accordance with an October 1982 agreement between the EEC and the United States, "including any modification, clarification, extension or successor agreement. * * *"[1] Also contained within § 805(b) was a provision which permits the Secretary to allow the importation of additional quantities of certain products after the Secretary finds the existence of a short supply of the product in the United States.[2]

On January 10, 1985, by way of letters, the EEC and the United States entered into a clarifying agreement concerning steel imports (the Arrangement). Under the Arrangement the EEC would restrain exports to, or destined for consumption in the United States of certain steel pipes and tubes to a level of 7.6% of U.S. apparent consumption for the years 1985 and 1986. For oil country tubular goods the limit was 10% of U.S. apparent consumption. Article 8 of the Arrangement, however, provides that pipe and tube exports above the specified limits will be accepted where a shortage of supply exists.[3]

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[1] Specifically, section 805(b)(1) of Title VIII of the Trade and Tariff Act of 1984 (Steel Import Stabilization Act), Pub. Law 98–573, 98 Stat. 2948, 19 U.S.C.A. § 2253 note (West 1980 & Supp. 1985) (SISA), provides in applicable part:

> In connection with the provisions of the Arrangement on European Communities' Export of Pipes and Tubes to the United States of America * * * including any modification, clarification, extension, or successor agreement thereto (collectively referred to hereinafter as 'the Arrangement'), the Secretary of Commerce is authorized to request the Secretary of the Treasury to take action pursuant to paragraph (2) of this subsection whenever he determines that—
>
> "(A) The level of exports of pipes and tubes to the United States from the European Communities is exceeding the average of annual United States apparent consumption specified in the Arrangement, or
>
> "(B) Distortion is occurring in the pattern of United States-European Communities trade within the pipe and tube sector. * * *

[2] Section 805(b)(3) of SISA provides:

> Nothing in this subsection may be construed as prohibiting the Secretary of Commerce from permitting the importation of additional quantities of specific products in cases where the Secretary determines that conditions of short supply or emergency economic situations related to market demand exist; except that a short supply or emergency economic situation shall not be considered to exist solely because domestic producers are unwilling to supply products at prices below their costs of production (as determined by the Secretary of Commerce).

[3] Article 8 of the Arrangement provides:

> The U.S. shall accept exports of pipes and tubes in addition to those permitted under section 1 and 2 where a shortage of supply is identified, i.e., where the U.S. industry is unable to meet demand in the USA for a particular product. At the request of the EEC, on the basis of information received from U.S. consumers, consultations shall take place between the EEC and the U.S. authorities. If necessary, the advice of an independent expert may be sought by either party.
>
> The U.S. shall make a decision under this section on the basis of objective evidence from all relevant sources within a maximum of sixty days from the date of the request for consultations.
>
> The U.S. recognizes that priority should be given to the examination, under the "short-supply" provisions of this Arrangement, of requests concerning contracts recognized to have been already concluded between USA and EC enterprises and which are in course of execution in connection with large projects.

Pursuant to the Arrangement, the EEC submitted a request to the DOC for consultation and a short supply exemption for the pipe required by the All American Pipeline project. Asking for priority treatment, the EEC claimed that the requisite product was not sufficiently available in the United States.

The DOC announced that it would examine the short supply exemption request and invited comments by February 15, 1985. 50 Fed. Reg. 4719 (1985). By letters dated March 28, 1985, the DOC informed both the EEC and the president of All American Pipeline Company that the pipe subject to the EEC's request could be supplied by three firms in the United States which had unused capacity of approximately one million tons, several times the amount of pipe covered by the requests. The DOC noted that its determination was based on responses to questionnaires sent to all U.S. producers, responses to the notice in the Federal Register, and consultations with All American Pipeline officials and their private consultant.

On May 13, 1985, manufacturers Sacilor and Bergrohr-Herne commenced an action in this court claiming that the DOC's March 28, 1985 determination was arbitrary, capricious, an abuse of discretion, and a denial of plaintiffs' due process rights. Plaintiff Vallourec filed a companion case on the same grounds.

As of June 18, 1985, it appears that the EEC and the United States have resolved their differences regarding pipes and tubes for the All American Pipeline. Defendants assert that this action is now moot. Plaintiffs have indicated that the amount approved for importation is less than that sought by plaintiffs, and therefore this action is not moot. This action remains a live controversy between the parties before the court.

II. JURISDICTION

Jurisdiction is predicated on 28 U.S.C. § 1581(i)(4) (1982) as it relates to 28 U.S.C. § 1581(i)(3) (1982).[4] These cases involve the administration of a law, SISA, imposing quantitative restrictions on certain steel imports. Defendant asserts that plaintiffs' claims rest only on the Arrangement, which it asserts does not have the force of law. It appears that executive international agreements, whether approved prior or subsequent to execution, have the force of law. *Cf. Weinberger* v. *Rossi,* 456 U.S. 25 (1982); *B. Altman & Co.* v.

[4] 28 U.S.C. § 1581(i) (1982) reads as follows:

§ 1581. Civil actions against the United States and agencies and officers thereof

* * * (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) Revenue from imports or tonnage;

(2) Tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) Embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) Administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

United States, 224 U.S. 583 (1912). In any case, plaintiffs also claim that their actions arise under SISA because it incorporates various parts of the Arrangement. This court's task then is to determine whether SISA gives plaintiffs the relief they seek, or whether Article 8 of the Arrangement in some manner confers rights on the plaintiffs. Under § 1581(i) the court has power to make this inquiry. Furthermore, because plaintiffs have no reasonably available remedy under § 1581(a), failure to exhaust administrative remedies will not bar suit. *See American Association of Exporters Importers-Textile and Apparel Group* v. *United States,* 751 F.2d 1239, 1244–1246 (Fed. Cir. 1985) (hereafter *AAEI*); *see also American Institute for Imported Steel, Inc.* v. *United States,* 8 CIT ——, 600 F. Supp. 204, 208 (1984).

III. Enforceable Private Rights

Section 802 of SISA states that the purpose of the act is to grant the President authority to enforce bilateral steel agreements and to condition the continuation of his authority on modernization of domestic steel production facilities. When referring in SISA to the Secretary's duties regarding the short supply exception to the quota levels set in the bilateral agreements, Congress used permissive language. Section 805(b)(3) states that the Secretary may permit importation of additional quantities of steel products into the United States. SISA contains no mandatory language regarding short supply except perhaps for a provision prohibiting a short supply determination based on unavailability of domestic steel at below cost prices. This limit on the short supply exemption is not involved here.

Although Article 8 of the Arrangement is written in mandatory terms, its terms bind only the signatory parties, the United States and the EEC. It is only the EEC which can request relief under Article 8 of the Arrangement. For an international agreement to be enforceable by private parties, either the agreement itself or the implementing legislation must contain language providing for the determination of private rights. *Dreyfus* v. *VonFink* 534 F.2d 24, 29–30 (2nd Cir. 1976); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3563 (2nd ed. 1984). Unlike the case of *People of Saipan* v. *United States,* 502 F.2d 90 (9th Cir. 1974), *cert. denied,* 420 U.S. 1003 (1975) (United Nations Trusteeship Agreement created substantive rights enforceable by plaintiffs), there is no language in either Article 8 of the Arrangement or § 805(b)(3) of SISA which indicates an intention to establish direct, affirmative, and judicially enforceable rights for private parties in the position of plaintiffs.

The legislative history of SISA also fails to support plaintiffs. It states that the short supply provision is "designed to protect domestic purchasers of steel products * * *." H.R. Rep. No. 1156, 98th Cong., 2d Sess. 200, *reprinted in* 1984 U.S. Code Cong. & Ad. News

5220, 5317. There is no mention of guaranteeing persons in the position of plaintiffs any access to United States markets.

IV. STANDING

The substantive laws of the United States provide plaintiffs no specific rights of action in this situation, but because the court has subject matter jurisdiction, review may lie under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701–706 (1982). *See Chrysler Corp.* v. *Brown,* 441 U.S. 281, 317 (1979); *Audubon Society* v. *Lee,* 742 F.2d 901, 911 n.18, *reh'g denied,* 750 F.2d 69 (5th Cir. 1984); *McCartin* v. *Norton,* 674 F.2d 1317, 1320 (9th Cir. 1982); *Glacier Park Foundation* v. *Watts,* 663 F.2d 882, 885 (9th Cir. 1981). Under 28 U.S.C. § 2631(i) (1982) plaintiffs may commence actions in this court if they are "adversely affected or aggrieved by agency action within the meaning of section 702 of title 5." "In order to assert a cognizable claim—or 'standing to sue'—under the APA, a plaintiff must demonstrate that it has suffered or will suffer 'injury in fact' sufficient to establish [constitutional] Article III standing and that the alleged injury to an interest is 'arguably within the zone of interests protected or regulated' by the statute that has allegedly been violated." *Dialysis Centers, Ltd.* v. *Schweiker,* 657 F.2d 135, 138, (7th Cir. 1981) (*citing United States* v. *SCRAP,* 412 U.S. 669, 686 (1975)). *See also Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59 (1978); *Florsheim Shoe Co.* v. *United States,* 744 F.2d 787, 790–92 (Fed. Cir. 1984); *Port of Astoria, Oregon* v. *Hodel,* 595 F.2d 467, 474 (9th Cir. 1979).

In *Australian Meat and Live Stock Corp.* v. *Block,* 7 CIT ——, 590 F. Supp. 1230 (1984), this court found that Australian meat exporters alleged economic injury in fact in challenging laws involving voluntary restraint agreements and quotas. The steel producers here allege similar injury as a result of SISA, and, thus, likely satisfy the constitutional aspect of the standing requirement.

The prudential, that is, the "zone of interests," aspect of standing is not as easily met. In making a "zone of interests" examination, courts generally look to the "language of the relevant statutory provisions and their legislative history." *Control Data Corp* v. *Baldridge,* 655 F.2d 283, 294 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 881 (1981) (footnotes omitted). A review of the applicable statute in these cases, SISA, does not indicate that the business prospects of foreign manufacturers are protected by that act. SISA speaks only of meeting short supply situations. The legislative history of SISA's short supply provision demonstrates that the provision was enacted only to protect American firms which are consumers of steel products. H.R. Rep. No. 1156. Moreover, unlike the statute in the *Australian Meat* case, SISA does not protect importers by creating a minimum level which could not be kept *out* of the United States. Rather, the statute provides a possible exception to increase a max-

imum allowable level of imports based on American industry's needs.

The prudential test of standing set forth in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153–57 (1972), however, contains alternative requirements. "The applicable 'zone' covers interests regulated as well as protected by the statute in question." *Community Nutrition Institute* v. *Bergland*, 493 F. Supp. 488, 492 (D.D.C. 1980). The *Community Nutrition* court held that soft drink manufacturers whose products were not approved by federal school lunch regulations had standing to challenge the regulations even though the purpose of the legislation on which the regulations were based was to provide nutritious food to children. When their products were excluded from the school lunch program, the manufacturers were regulated by the relevant act. In the instant cases, plaintiffs' product is partially excluded from importation because of SISA and the agreements permitted by SISA. The foreign manufacturers are thus arguably regulated by the relevant statute. Accordingly, the prudential test of standing is met in these cases and plaintiffs, therefore, satisfy both standing requirements.

V. Judicial Review

"Apart from the question of standing to sue, [the court's] inquiry into the availability of judicial review requires a separate examination of whether Congress has placed [the Secretary's] action beyond the reach of judicial cognizance." *Concerned Residents of Buck Hills Falls* v. *Grant*, 537 F.2d 29, 34 (3rd Cir. 1976). Thus, the final question remaining is whether these cases fall within the exception to APA review for agency action committed to agency discretion by law. 5 U.S.C. § 701(a) (1982). The court finds that the type of judicial review sought by plaintiffs is unavailable in these cases.

First, these cases concern a decision by the Secretary which involves both foreign affairs and domestic matters. Congress could have set up procedures for decision-making on short supply issues which limit the Secretary's discretion and which involve no foreign affairs function, but it did not do so. Congress placed the short supply provision in a statute which is largely concerned with bilateral agreements between the United States and steel-exporting nations, and it used no words to remove the short supply decision-making function from the general process of consultation between the involved governmental bodies. Although the Arrangement includes certain minimal standards which govern the consultations on short supply, those standards are not part of the statute for the purpose of determining the scope of judicial review. *See AAEI*, 751 F.2d at 1248, *Mast Industries, Inc.* v. *Regan*, 8 CIT ——, 596 F. Supp. 1567, 1576 (1984).

Congress recognized the foreign affairs, discretionary nature of a short supply determination by neither setting forth in § 805(b)(3) standards which the Secretary must apply, nor requiring publica-

tion of specific findings.[5] Because it is unrestricted, § 805(b)(3) permits the Secretary to make a short supply determination by any reasonable means, including the consultations between governmental bodies envisioned in Article 8 of the Arrangement. Consultations between this government and foreign powers are foreign affairs matters. The indication in the legislative history that the purpose of § 805(b)(3) is to protect domestic purchasers does not override the permissive nature of the provision and the overall statutory scheme, which places the decision here in the foreign affairs arena.[6] Where foreign affairs and domestic matters are mixed, Congressional delegation must be broadly construed. *Florsheim Shoe Co.* v. *United States,* 744 F.2d 787, 793 (Fed. Cir. 1984) (*citing South Puerto Rico Sugar Co. Trading Corp.* v. *United States,* 334 F.2d 622, 632 (Ct. Cl. 1964), *cert. denied,* 379 U.S. 964 (1965)).

Second, because the decision on short supply is part of the foreign affairs process, review is extremely limited. By law, such matters are committed to Executive discretion. *See Jensen* v. *National Marine Fisheries Service,* 512 F.2d 1189, 1191 (9th Cir. 1975). The court cannot review the Secretary's findings; the court can only determine whether the authorizing law has been followed. *United States* v. *George S. Bush & Co.,* 310 U.S. 371, 379–80 (1940); *AAEI,* 751 F.2d at 1248; *Florsheim,* 744 F.2d at 793; *United States Cane Sugar Refiner's Ass'n.* v. *Block,* 69 CCPA 172, 177, 683 F.2d 399, 404 (CCPA 1982). Unlike the *Australian Meat* case there is not dispute here regarding the scope of the Secretary's authority to act. It is undisputed that the Secretary gathered evidence on the issue of short supply and that a decision was made that relates to short supply. Thus, the court finds that the limited review allowed of the President's decision to withdraw duty-free status as to certain articles in the *Florsheim* case provides the best guide as to the scope of review here. The broader type of review sought by plaintiffs necessarily involves an impermissible intrusion into a discretionary decision-making process.

Here, the Secretary made a decision regarding import levels following consultations with a foreign governmental entity. Although the "agency discretion" exception to APA review is quite narrow, *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410 (1971), the court finds that this matter clearly and directly involves a foreign affairs function. As such, it is committed to agency discretion. *Cf. Mast Industries, Inc.* v. *Regan,* 596 F. Supp. at 1580–82. Therefore, it is inappropriate for the court to review the Secretary determination.

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[5] DOC's use of notice and comment procedures is not an admission of the APA's applicability, as plaintiffs contend. It appears an expedient way to carry out the terms of the Arrangement. The use of similar procedures in the *Florsheim* case did not mandate broad judicial review.

[6] Plaintiffs argue that short supply determinations are not encompassed within the foreign affairs power because Congress has instructed the Secretary of Commerce, rather than the President, or the Secretary of State, to act on short supply requests. The Secretary of Commerce is involved in some foreign affairs matters apart from this area. *See, e.g.,* 22 U.S.C. § 2123(a)(2) (1982). Furthermore, as a cabinet officer the Secretary is subject to the direction of the President.

VI. Due Process

In addition, plaintiffs claim that because no hearing on short supply was held, they were denied due process. "Those seeking constitutional protection under the due process clause must point to a 'legitimate claim of entitlement' prior to any considerations of the Government's constitutional obligations". *AAEI*, 751 F.2d at 1250 (*quoting Arnett* v. *Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J. concurring), *reh'g denied*, 417 U.S. 977 (1974)). As indicated, the statute, SISA, and the Arrangement give plaintiffs no rights. Furthermore, there is no generally available, protectable interest to engage in foreign trade. *AAEI*, 751 F.2d at 1250 (*citing Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933), *and United States* v. *Yoshida International, Inc.*, 63 CCPA 15, 32, 526 F.2d 560, 580 (1975)). Accordingly, plaintiffs' due process claims must fail.

For the foregoing reasons, plaintiffs' actions are dismissed.

(Slip Op. 85–67)

JAMES A. BARNHART, PLAINTIFF *v.* U.S. TREASURY DEPARTMENT, DEFENDANT

Court No. 81–3–00328

Before FORD, *Judge.*

Memorandum Opinion and Order

[Judgment for defendant; case dismissed.]
(Decided: June 24, 1985)

Leonard M. Fertman, P.C., Leonard M. Fertman; Arthur E. Schwimmer for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commerical Litigation, *Saul Davis* for the defendant.

FORD, *Judge:* The matter before the Court involves review of an order of the Secretary of the Treasury (Secretary) suspending plaintiff's customshouse broker's license for a period of ninety days. The Secretary had originally entered an order revoking plaintiff's license. In accordance with this Court's order of remand in *James A. Barnhart* v. *United States Department of Treasury*, 7 CIT ——, Slip Op. 84–59, 588 F. Supp. 1432 (May 31, 1984), a procedural due process failure at the administrative level was corrected and the subsequent decision modified the original penalty. Jurisdiction is pursuant to section 641(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(b), and 28 U.S.C. § 1581(g).

The facts in this case were extensively summarized in *Barnhart* (supra) and need not be fully repeated here. Briefly, plaintiff was convicted on four counts of receiving stolen merchandise and one count of conspiracy on March 22, 1976. On June 13, 1978, plaintiff's convictions were set aside and the case against him dismissed pur-

suant to California Penal Code § 1203.4. The Customs Service issued a Notice to Show Cause and Statement of Charges on July 18, 1979, charging plaintiff with being disreputable based on misconduct as evidenced by his convictions. An administrative hearing was held, and the hearing officer, a Customs official, recommended that plaintiff be given a serious reprimand. The Customs Service filed timely exceptions to the hearing officers decision, but these exceptions were not served on plaintiff.

On February 3, 1981, the Secretary issued an order revoking plaintiff's customhouse broker's license. Plaintiff appealed to this Court which, after a hearing, remanded the case to allow plaintiff to respond to the exceptions to the hearing officer's decision filed by the Customs Service. In its subsequent decision, the Treasury Department modified its penalty from revocation to a ninety day suspension. It is from that action plaintiff presently appeals.

Two issues are raised by plaintiff in this review. Plaintiff contends the term "disreputable", as used in 19 U.S.C. § 1641(b), is void for vagueness on its face. Consequently, plaintiff argues the suspension of his customhouse broker's license on that sole statutory ground constitutes a violation of due process under the Fifth Amendment. Plaintiff also alleges the decision of the Secretary suspending plaintiff's license is arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence.

19 U.S.C. § 1641(b) sets forth the grounds for revocation or suspension of a customhouse broker's license. For the purposes of this challenge, the statute provides, in relevant part:

> * * * [the] Secretary of the Treasury shall have the right to revoke or suspend the license of any customhouse broker shown to be incompetent, disreputable, or who has refused to comply with the rules and regulations issued under this section * * *.

In assessing the claim that the term "disreputable" is void for vagueness on its face, the Court is aware of the strong presumption of constitutional validity given to Congressional legislation. *United States* v. *Caroline Products Co.*, 304 U.S. 144 (1938); *Erie Navigation Co.* v. *United States*, 83 Cust Ct. 47, C.D. 4820 (1979). "When one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a clear statement of a contrary legislative intent." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976).

In enacting the statute at issue, Congress set forth, in broad statutory terms, the standards governing revocation and suspension of a customhouse broker's license. In so doing, it must be assumed Congress was concerned with regulating the conduct of persons acting under the auspices of the United States Government. The Secretary was delegated the specific authority to define and implement those standards through agency regulations. This was accom-

plished by the promulgation of 19 C.F.R. § 111.53, which encompasses the improper conduct specified in Part III of the regulations and places the brokerage community on notice as to the types of conduct prohibited.

In establishing a system conditioning the grant and retention of a broker's license upon good moral character and knowledge of customs-related laws, Congress clearly intended to monitor behavior that would affect the conduct of a brokerage business and the ability to rely on the honesty and competency which the license represents. The validity of this purpose has long been recognized by the Courts. See, e.g., *In re Landeck & Merrill,* 20 F.2d 249 (1927). Viewed in this context, the use of the term "disreputable" in the statute cannot be considered either unduly vague or violative of the due process clause of the Fifth Amendment. "If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States* v. *Petrillo,* 332 U.S. 1, 7 [1947]. Cf. *Jordan* v. *DeGeorge,* 341 U.S. 223, 231 [1951]. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, [the] Court is under a duty to give the statute that construction." *United States* v. *Harriss,* 347 U.S. 612 (1954). Thus construed, I find the term "disreputable", as used in 19 U.S.C. § 1641(b), fully within the parameters of constitutionality and not void for vagueness.[1]

In suspending plaintiff's license for a period of ninety days, the Secretary found "a preponderance of credible evidence supports a conclusion that [plaintiff] engaged in the misconduct of which he was subsequently convicted and that such conduct is disreputable within the meaning of 19 U.S.C. § 1641(b)". Plaintiff contends this decision is arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence. Two questions are thus presented to the Court: whether there is substantial evidence to support the finding that plaintiff is disreputable; and whether the Secretary's decision to suspend plaintiff's license constitutes an abuse of discretion.

Under 5 U.S.C. § 706, the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be unsupported by substantial evidence. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion. *Falwood* v. *Heckler,* 594 F.Supp. 540 (1984); *Kindred* v. *Heckler,* 595 F.Supp. 563 (1984). This is something less than the weight of the evidence, and the possibility of

[1] In October 1984 Congress revised Section 641 by enacting Section 212(a) of the Trade and Tariff Act of 1984, P.L. 98-573, 98 Stat. 2948. The revised provision governing disciplinary proceeding against customs brokers omits the term "disreputable". However, Section 214(d)(3) of P.L. 98-573 provides: "Any proceeding for revocation of suspension of a license instituted under section 641 of the Tariff Act of 1930 before the date of the enactment of this Act [October 30, 1984] shall continue and be governed by the law in effect at the time the proceeding was instituted."

drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Asarco, Inc.* v. *Occupational Safety and Health Administration,*746 F.2d 483 (1984); *St. Elizabeth Community Hospital* v. *Heckler,* 745 F.2d 587 (1984). The Court may not substitute its judgment for that of the administrative agency. *Oneida Indian Nation of New York* v. *Clark,* 593 F.Supp. 257 (1984).

Both the original decision to revoke and the subsequent decision suspending plaintiff's license were based in part upon a finding that plaintiff's felony convictions could be considered evidence of the underlying misconduct with which he was charged, i.e., being disreputable. In so finding, the Secretary overruled the decision of the hearing officer, who held that since plaintiff's convictions had been expunged pursuant to California law, there was insufficient evidence of disreputable conduct on plaintiff's part to warrant a sanction more severe than a serious reprimand. Neither federal law nor the applicable administrative regulations specify the effect of a state pardon on federal licenising procedures. However, state proceeding expunging a record of disreputable conduct cannot affect federal proceedings based on such conduct as expungement does not change the character of the conduct involved. *Diaz* v. *Chasen,* 642 F.2d 764 (1981).

Based on the record before me, I do not find the decision of the Secretary to be unsupported by substantial evidence. The Secretary properly considered plaintiff's felony convictions as evidence of the underlying misconduct with which he was charged. *Taylor* v. *U.S. Civil Service Commission,* 374 F.2d 466 (1967). The Secretary further determined such conduct related directly to plaintiff's honesty and integrity as a customhouse broker. The mitigating evidence as to plaintiff's reputation was also cited in the Secretary's decision. Under these circumstances, the Secretary could properly conclude the evidence would deem plaintiff disreputable. Accordingly, the Court will not disturb the findings of the Secretary.

The remaining issue to be addressed is whether the Secretary's decision to suspend plaintiff's license constitutes an abuse of discretion. Both 19 U.S.C. § 1641(b) and 19 C.F.R. § 111.53 specifically provide for the penalty imposed by the Secretary. In view of this fact, the Court's scope of review under 5 U.S.C. § 706 is limited. After satisfying itself the agency has acted within its statutory authority and the action was accompanied by appropriate procedural protections and supported by substantial evidence, the Court must inquire whether the rationale of the agency is both discernable and defensible. In so doing, the Court may not substitute its judgment for that of the agency, but need only assure itself the decision was rational and based on consideration of relevant factors. *Trans-Pacific Freight Conference* v. *Federal Maritime Commission,* 650 F.2d 1235 (1980).

The abuse of discretion standard, as described in *Tempo Trucking and Transfer Corp.* v *Dickson, et al.*, 405 F.Supp. 506, 514 (1975), provides:

> When the penalty chosen by an agency is within the range of sanctions provided by applicable disciplinary regulations, the severity of the sanction imposed is within the discretion of the agency. *Ricci* v. *U.S.*, 507 F.2d 1390, 1393 (1974). Further, the imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *Butz* v. *Glover Livestock Commission Company*, 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed. 2d 142 (1973), *rehearing denied*, 412 U.S. 993 S.Ct. 2746 37 L.Ed. 2d 162.

In the case at bar, the decision of the Secretary to suspend plaintiff's license for ninety days does not constitute an abuse of discretion. The Secretary acted within his statutory authority and the action taken met the procedural requirements and was supported by substantial evidence. The severity of the punishment imposed was within the parameters provided by the applicable statute and regulations. The Court is satisfied the relevant factors were considered. The Court is equally satisfied the choice of available sanctions was rational under the facts presented. In view of the foregoing, the Court will not substitute its judgment for that of the Secretary. The decision suspending plaintiff's customhouse broker's license for a period of ninety days is therefore affirmed. Judgment will be entered accordingly.

(Slip Op. 85-68)

I.C.D. GROUP, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-8-01017

Before: CARMAN, *Judge.*

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion for summary judgment denied. Defendant's cross-motion for summary judgment denied.]

(Decided June 26, 1985)

Serko & Simon (*Joel K. Simon* on the motion; *Luciana Lew* and *George S. Locker* with him on the brief), for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Judith M. Barzilay* on the motion) for the defendant.

CARMAN, *Judge:* Before the Court is plaintiff's motion for summary judgement pursuant to Rule 56, Rules of the United States Court of International Trade. Defendant opposes the motion con-

tending that there is a genuine issue of material fact to be tried and, in the alternative, cross-moves for summary judgment.

FACTS

The plaintiff in this action is challenging the United States Customs Service's (Customs) classification of women's raincoats, imported from Taiwan. The raincoats were classified as ornamental wearing apparel of cotton, under item 382.00, Tariff Schedules of the United States (TSUS), dutiable at the rate of 35% *ad valorem*. Plaintiff claims that the correct classification belongs under item 382.12, TSUS, as women's wearing apparel of cotton, not ornamented, dutiable at the rate of 8% *ad valorem*.

The focus of the dispute over the classification involves cross-stitching appearing on the shoulder straps of the coat. The question is whether this stitching is primarily functional or ornamental in nature.

It is the contention of the defendant that the cross-stitching is solely ornamental and serves no functional purpose. The government relies on the affidavit of Kathleen Mulligan, a textile analyst in the U.S. Customs Service lab for the New York region.

Plaintiff maintains that the stitching is functional in nature and does not serve to ornament the subject garment. Plaintiff relies on the expert opinion of Edmund Roberts, professor of fashion design for women's apparel at the Fashion Institute of Technology.

DISCUSSION

On a motion for summary judgment, "the Court cannot try issues of fact; it can only determine whether there are issues to be tried." *Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975). The present conflict of expert opinion and factual assertion indicates that there are material issues of fact requiring trial. Here where there is a genuine factual dispute summary judgment cannot be granted. *See S. S. Kresge Co.* v. *United States*, 77 Cust. Ct. 154, 155 C.R.D. 76–6 (1976).

In determining the classification of the raincoat, the Court must decide whether the stitching is primarily functional or ornamental. In *Baylis Brothers, Inc.* v. *United States*, 60 Cust. Ct. 336, C.D. 3383 (1968), a case involving the determination of stitching on the front of women's dresses, the court stated:

> "The evidentiary issue * * * is whether the primary purpose of the stitching is for decoration rather than utility. The term purpose * * * must, of course, be understood to mean function rather than the subjective intent of the manufacturers. It is the resultant effect of, and not the claimed motivation for, the stitching which determines the issue.

Id. at 341.

478-995 O - 85 - 2

The affidavits of the two experts are in direct conflict as to the primary purpose and function of the stitching. Roberts, affiant for plaintiff, states that the stitching functions primarily to bind together the three layers of cloth which comprise the strap and reinforces the area subject to the greatest stress and wear. Roberts also asserts that the cross-stitching is useful in manufacturing the article by making it easier to attach the strap to the garment, that the stitching keeps the strap from buckling and holds it in place during pressing, and that the cross-stitching is located in an inconspicuous place and does not serve to ornament the coat.

Mulligan, affiant for defendant, states that the three layers of the strap are held together by adhesive and stitching sewn lengthwise. She also states that the cross-stitching does not strengthen the fabric, that the area covered by the cross-stitching is not subject to any amount of stress, and that the cross-stitching is not needed to flatten the strap or prevent buckling. Mulligan states further that the cross-stitching is superfluous except that it enhances the visual appeal of the coat.

In this case, the assertions of fact could not be more divergent. Absent a clear showing as to the nature of the stitching, motions for summary judgment cannot be granted.

CONCLUSION

The present conflict of expert opinion and factual assertion leaves open a material question of fact. Since there is still a genuine issue of factual dispute outstanding between the parties, plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is denied.

(Slip Op. 85-69)

MAINE POTATO COUNCIL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-1-00141

Before: RESTANI, *Judge.*

OPINION AND ORDER

[Final negative antidumping determination of United States International Trade Commission remanded for further consideration.]

(Decided June 27, 1985)

Heron, Burchette, Ruckert & Rothwell (Thomas A. Rothwell, Jr., James M. Lyons and *Alfred G. Scholle)* for plaintiff.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel, United States International Trade Commission (*Stephen A. McLaughlin*), for defendant.

RESTANI, *Judge:* Plaintiff, the Maine Potato Council, challenges a final determination of the United States International Trade Com-

mission (ITC or Commission) regarding its investigation of fall-harvested round white potatoes from Canada. The Commission, on December 19, 1983, pursuant to § 735(b)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(b)(1) (1982), found that the domestic industry was not suffering from, or threatened with, material injury by reason of imports of fall-harvested round white potatoes from Canada sold at less than fair value (LTFV). *Fall-Harvested Round White Potatoes from Canada*, Inv. No. 731-TA-124 (Final), USITC Pub. No. 1463 (December 1983); 48 Fed. Reg. 57,381 (December 29, 1983). This negative injury determination followed affirmative findings by the International Trade Administration of the Department of Commerce (ITA) that fall-harvested round white potatoes from Canada were being sold in this country at LTFV. 48 Fed. Reg. 51,669 (November 10, 1983).

Jurisdiction in this action is predicated upon 28 U.S.C. § 1581(c) (1982). This matter is before the court, pursuant to Court of International Trade Rule 56.1, on plaintiff's motion for review of administrative determinations upon the agency record.

For the reasons that follow, the court concludes that some of the ITC's findings are supported by substantial evidence in the administrative record and other findings are remanded for further consideration not inconsistent with this opinion.

I. ITC Findings Regarding the Domestic Fall-Harvested Round White Potato Industry

In a final antidumping investigation, the ITC is required to determine whether:

> (A) An industry in the United States—
> (i) Is materially injured, or
> (ii) Is threatened with material injury, or
>
> (B) The establishment of an industry in the United States is materially retarded,
>
> *by reason of imports* of the merchandise with respect to which the administering authority [ITA] has made an affirmative determination under subsection (a)(1) of this section.

19 U.S.C. § 1673d(b)(1) (1982) (emphasis added). Thus, without both a finding of material injury, or threat thereof, and a finding that such injury was by reason of the subject imports, antidumping relief may not be granted.

The Commission unanimously found that the industry in the United States was not materially injured or threatened with material injury by reason of imports of fall-harvested round white potatoes from Canada at LTFV.[1] *Fall-Harvested Round White Potatoes*

[1] Plaintiff does not appear to challenge specifically the Commission's finding with regard to threat of material injury.

from Canada, Inv. No. 731-TA-124 (Final), USITC Pub. No. 1463 at 3 (December 1983) (ITC Opinion). The Commission found that the regional domestic industry was "experiencing material injury, reflected primarily by irregular declines in acreage harvested, a decline in part-time employment, financial losses and difficulty in obtaining financial assistance." ITC Opinion at 3. The Commission explained its conclusion that the Canadian LTFV imports were not a cause of the industry's problems:

> An analysis of the price and volume effects of the Canadian imports on the domestic industry indicates that changes in regional domestic production, rather than imports, determine prices of fall-harvested round white potatoes in the U.S. market. A causal link between the imports and the domestic industry's injury is absent since most losses to the industry occurred when imports were lowest and domestic production was highest. Moreover, once in the U.S. market, the volume effect of Canadian potatoes on price was insignificant or non-existent; the increase in domestic production from 1980/81 to 1982/83 was the predominant factor affecting price.
>
> Pricing data further demonstrate that both import and domestic prices rose and fell together, apparently in response to the same changes in domestic production; that prices in the Northeast market were highly correlated with prices in other sections of the country where imports were absent or less concentrated; and that Canadian potatoes did not undersell the domestic product. Also, other factors such as tighter size standards, a perceived higher quality of the Canadian potato and more effective marketing organization among many Canadian growers were found to contribute to the competitiveness of the Canadian product.
>
> No threat of injury was found to exist to the industry, since import penetration has fallen, Canadian inventories are down, and production of round whites in Eastern Canada in not expected to increase.

ITC Opinion at 4.

II. Evidence in the Record Regarding Material Injury by Reason of LTFV Imports

"Material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982). The Commission found in this case that data for the domestic industry or regional acreage, employment, and financial condition indicated that potato growers in the Northeastern region have experienced material injury. Specific findings include the following: (1) acreage harvested fell 14.8% during the 5-year period investigated; (2) full and part-time employment fell over 15.0% from 1980/81 to 1982/83; and (3) hours worked by persons engaged in potato operations de-

clined 7.0% from 1980/81 to 1982/83. Available financial data indicated losses to the industry, particularly in 1980 and 1982.[2]

As indicated previously, the Commission, however, concluded that such injury was not caused or predominantly caused by the LTFV imports. The Commission found that LTFV imports had no measurable effect on domestic prices in the regional market. The Commission noted that when domestic production increased, the average price for Maine potatoes decreased, and vice versa.[3] The data showed that imports into the United States market increased when prices in this market were highest, and that losses to the domestic industry were greatest when regional domestic production was high and imports were relatively low.

The Commission also indicated that the volume effect of the LTFV imports on United States prices was insignificant. The Commission noted that in 1980/81 the average wholesale price of round white potatoes in the New York City terminal market increased even though LTFV Canadian imports increased.[4] In comparison, the price fell between 1981/82 and 1982/83, even though imports into the region fell. In general, price data for domestic and imported potatoes rose and fell together.

Moreover, the Commission found that potato prices in the regional market were highly correlated with prices in United States cities where Canadian imports were absent or less concentrated. The Commission concluded that this suggests that the domestic potato prices were responding to changes in regional domestic production rather than the price of imports.

Price data also demonstrated that Canadian imports generally sold for higher prices than Maine potatoes. Every month from September 1979 to October 1983, Canadian imports sold in the New York City terminal market were higher priced than Maine round white potatoes. Similarly, Boston's prices for the Canadian imports during all but two of these months were higher than for the domestic items. In Philadelphia, three of the four months examined in 1983 also showed Canadian imports selling at higher prices than Maine potatoes. Other data revealed that prices of New Brunswick potatoes tended to be higher than prices of Maine potatoes in Janu-

[2] Additional evidence of the Maine growers' financial difficulties was found in data provided by the Farmers Home Administration (FmHA), which finances over 50% of Maine's potato growers. The number of potato farms financed declined from 518 in 1979 to 428 in 1983, or by 17%, and the number of potato acres financed declined from 44,627 in 1979 to 35,249 in 1983, or by 21%. In 1983 alone, the FmHA dropped 88 potato farmers. Also in 1983, the FmHA financed 47 new farmers, most of whom were no longer able to secure financing from production credit associations or private banks. The percentage of loans collected by the FmHA declined substantially between 1980 and 1982.

[3] In 1980/81, average prices for Maine potatoes (Maine prices) were $6.52 in New York City and $5.85 in Boston. In 1981/82, regional production increased 6.4% and average Maine prices fell to $4.33 in New York City and to $3.86 in Boston. In 1982/83, regional production increased 6.2%, and average Maine prices declined to $3.77 in New York City and to $3.38 in Boston. In 1983, regional production declined 18.8% and average Maine prices rose to $5.50 in New York and to $4.85 in Boston.

[4] The Commission observed that imports increased from 787,000 hundredweight (cwt.) in 1979/80 to 1.8 million cwt. in 1980/81. Imports increased slightly in 1981/82 to 2.1 million cwt., declining in 1982/83 to 1.3 million cwt. The ratio of imports to apparent consumption in the regional market increased from 2.5% in 1979/80 to 6.4% in 1980/81 and to 6.7% in 1981/82. Import penetration then decreased to 4.0% in 1982/83.

ary 1983 and that prices for Prince Edward Island potatoes tended to be substantially higher than Maine prices for the same period.

While the Commission stated that fall-harvested round white potatoes from New Brunswick, Canada, and Maine were generally considered equal in quality,[5] nonprice factors were found to contribute to the competitiveness of the Canadian potatoes. Prince Edward Island potatoes are considered more appealing in appearance because they are grown in a reddish soil, and both Prince Edward Island and New Brunswick potatoes are preferred due to more uniform Canadian size requirements.[6] Differences in Canadian and U.S. marketing also contributed to the competitiveness of Canadian potatoes.

III. Legality of the Commission's Findings

A. *Consideration of LTFV Margins.* Plaintiff challenges the ITC's negative injury determination on several grounds. First, plaintiff complains that the Commission's causation analysis is flawed because the Commission failed to consider the effect of the dumping margins on the domestic industry. Plaintiff asserts that in certain cases the Commission is required to address explicitly the impact of the dumping margin on the domestic industry, and that the instant case falls in that category. Plaintiff, however, fails to offer convincing support for its proposition that the ITC must perform a margins analysis. Plaintiff's only authority is *Carbon Steel Wire Rod from Brazil, Belgium, France, and Venezuela,* Inv. Nos. 701-TA-148, 149, 150 and 731-TA-88 (Preliminary), 47 Fed. Reg. 13,927 (April 1, 1982). In that case, Commissioner Paula Stern argued that the Commission could make a negative final determination if "dumping has accounted for only a small portion of the margin of underselling. * * *" 47 Fed. Reg. at 13,933. Plaintiff offers no authority in which the Commission has ever considered the margin of dumping in reaching an affirmative final determination. Chairman Alfred E. Eckes in *Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea and Taiwan,* Inv. Nos. 731-TA-131, 132 and 138 (Final), USITC Pub. No. 1519 at 11 n. 46 (1984), Stated that:

> [D]espite an ambiguous reference to margins in a Committee report, the law makes no reference to Commission consideration of LTFV margins, or does it suggest that the size of such margins is dispositive of the causation issue.

The Commission further stated:

> [T]he fact that the LTFV margins are more likely to be manifested in low prices in the U.S. market, in comparison to the amount of the subsidy, does not aid in interpreting the cau-

[5] Presumably taste was the main factor in this quality determination.
[6] The court will refer to these particular nonprice factors as quality factors in subsequent discussions.

> sality requirement of the statute. As currently written, there is no suggestion in the statutory definition of material injury, which applies both to countervailing and antidumping duty determinations, that the Commission should base its injury finding on the price effect of the subsidy or the LTFV margins. *See* 19 U.S.C. § 1677(7).

USITC Pub. No. 1519 at 11 n.47. Thus, it appears that the Commission's interpretation of the statute does not require consideration of LTFV margins. An agency's interpretation of a statute it is charged with administering is entitled to great weight. *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984) (*citing Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)).

Moreover, a recent Congress spoke on this issue. An early draft of the Trade and Tariff Act of 1984 contained a provision which would have given the Commission the authority to base decisions on the size and the dumping or subsidy margin found by the ITA. The House Ways and Means Committee voted to delete this provision. Language in a corresponding provision dealing with interlocutory appeals to this court, however, temporarily—and erroneously—survived. The following colloquy on the floor of the House explains:

> Mr. JENKINS. Mr. Chairman, I would like to engage the chairman of the Trade Subcommittee in a brief colloquy. I understand that section 110 of the bill[,] which deals with interlocutory appeals[,] may still contain language which refers to determinations by the Commission based on the size of the dumping margin or net subsidy. In the Ways and Means Committee we voted to delete a provision which would have given the Commission authority to base its decision on the dumping margin or subsidy level. Therefore, I would assume that this language in section 110 should have been deleted. Can the gentleman assure me that this language does not authorize such determinations by the Commission and that at some future point the necessary conforming changes will be made?
>
> Mr. GIBBONS. Mr. Chairman, will the gentleman yield.[?]
>
> Mr. JENKINS. I yield to the chairman of the subcommittee.
>
> Mr. GIBBONS. The gentleman is correct, Regrettably, we should have deleted this reference in section 110. Let me assure you that this language deals only with the time periods for filing appeals with the Court of International Trade and in no way does it confer authority on the Commission to base determinations on the subsidy level or dumping margin. I also want to assure you we will work with the Senate to modify the language and correct the problem, but since it is a very minor technical change, I do not see any need for us to deal with it at this time.

96 Cong. Rec. H7908–09 (daily ed. July 26, 1984).

The legislative history of the 1984 Act supports the court's conclusion that the Commission is not required to consider dumping margins in reaching a decision on material injury by reason of LTFV imports. Although the court should not place too high a value on the views of one Congress as to the construction of a statute enacted by another Congress, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968), the views of a subsequent Congress may be given some consideration in interpreting relevant Congressional intent. *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356–57 (1962); *see Heckler* v. *Turner*, 105 S. Ct. 1138, 1152–53 (1985); *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973). This is particularly true where the enacting Congress was silent and where the views found in the legislative history are in accord with the statutory language.

B. *LTFV Imports as a Contributing Cause of Material Injury.* Second, plaintiff complains that the Commission's causation analysis is flawed because the Commission stated that LTFV imports were not a "material cause" of the domestic industry's injury. ITC Opinion at 3. The use of the term "material cause," plaintiff argues, demonstrates that the ITC employed the wrong causation standard. Plaintiff correctly asserts that it is not necessary for plaintiff to show that the imports are the sole cause, nor even the major cause of injury, as long as the facts show that LTFV imports are more than a *de minimis* factor in contributing to the injury. *See British Steel Corp.* v. *United States*, 8 CIT ——, 593 F. Supp. 405, 413 (1984); *Pig Iron from Canada, Finland and West Germany*, Inv. Nos. AA 1921–72, 73, 74, T.C. Pub. No. 398 at 6 (1971); *Elemental Sulphur From Mexico*, Inv. No. AA 1921–92, T.C. Pub. No. 484 at 3 (1972). Plaintiff argues that the Commission failed to consider whether LTFV imports were a "contributing" cause, and that instead the Commission required evidence that the LTFV imports were a "material cause." Plaintiff also argues that because the ITC determined that the LTFV imports were not a "material cause" of the domestic industry's injury, it inferred that LTFV imports were a "contributing cause" of injury. Although the court will not rely solely on what might be a simple mistake in word usage, the court is concerned as to whether the Commission actually weighed causes and improperly discounted a contributing cause of injury.

In this regard, plaintiff contends that there is substantial evidence in the record to support a finding that imports were indeed a contributing cause of injury and that the ITC, therefore, must have improperly weighed causes. Plaintiff specifically argues that an econometric study prepared by the Commission's staff establishes that the volume of LTFV imports found here would significantly reduce domestic prices, and that this study so detracts from the evidence supporting a negative injury determination as to eradicate it, or at least to render it insubstantial. In effect, plaintiff

argues that the ITC's determination is unsupported by substantial evidence in the record.

In reviewing the Commission's determination, this court must sustain "a final negative injury determination by the ITC * * * unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.' 19 U.S.C. § 1516a(b)(1)(B) (1982)." *American Spring Wire Corp.* v. *United States,* 6 CIT ——, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom. Armco, Inc.* v. *United States,* No. 84-1715 (Fed. Cir. May 2, 1985). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Electric Industrial Co.* v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (*quoting Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951), and *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938)); and *quoted in American Spring Wire Corp.,* 590 F. Supp. at 1276. "The court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* * * *.'" *American Spring Wire Corp.,* 590 F. Supp. at 1276 (*quoting Penntech Papers, Inc.* v. *NLRB,* 706 F.2d 18, 22-23 (1st Cir. 1983), *cert. denied,* 104 S. Ct. 237 (1983) (*quoting Universal Camera Corp.,* 340 U.S.C. at 488)). *See also Sprague Electric Co.* v. *United States,* 2 CIT 302, 310-11, 529 F. Supp. 676, 682-83 (1981). It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence. *See* S. Rep. 249, 96th Cong., 1st Sess. at 74-75 (1979).

In this case, the Commission states that import volume effects on price were insignificant. The court understands this to mean that price levels were controlled by domestic factors, but the Commission also states that price was *predominantly* controlled by domestic production. In footnote 46 of its opinion the Commission cites the econometric study mentioned above in support of this proposition.[7] It is one thing to say domestic factors caused the injury and quite another to say that such factors were the dominant ones in the causation of injury. In its opinion the Commission appears to say both. The court is left with the impossible task of deciding which of two conclusions was reached by the Commission.[8] As indicated, it is not for the court to say in the first instance, which conclusion is best supported by the evidence. This is a determination

[7] Plaintiff argues that because the ITC found lesser degrees of import penetration significant in other cases, it should do so here. *See Certain Carbon Steel Products from Spain,* Inv. Nos. 701-TA-155, 157, 158, 159, 160, and 162 (Final), 48 Fed. Reg. 525 (January 5, 1983); *Carbon Steel Wire Rod from Brazil and Trinidad and Tobago,* Inv. Nos. 731-TA-113 and 114 (Final,) USITC Pub. No. 1444 (October 1983). The problem with plaintiff's position is that the Commission must make its determinations on a case-by-case basis, H.R. Rep. 317, 96th Cong., 1st Sess. at 46 (1979); S. Rep. 249, 96th Cong., 1st Sess. at 88 (1979). The volume of potato production varies dramatically and is reflective of an industry very different from non-agricultural industries. While factual similarities with regard to dissimilar industries may be probative evidence, they do not require similar conclusions.

[8] The court does not accept plaintiff's argument that the econometric study mandates an affirmative injury determination. Such a theoretical model, based on a set of assumptions, may be outweighed by real world data.

which must be made by the Commission.[9] If the Commission concludes that LTFV imports were anything but a *de minimis* cause of injury, it must make an affirmative injury finding. *See British Steel Corp.*, 593 F. Supp. at 413.

C. *Underselling: Levels of Comparison.* Third, plaintiff challenges the methods used by the ITC in reaching its decision that there was no price undercutting. Plaintiff argues that the Commission's decision is flawed because it did not compare prices at an "optimum level." That is, plaintiff argues that it was incumbent on the ITC to compare prices at levels closer to the potato growers before the Commission could properly conclude that the imports did not undersell the domestic product.

The record, however, shows that the Commission made its finding of no underselling by examining data from several sources. The ITC sent out questionnaires regarding actual price, but failed to receive adequate data in response to make a determination as to underselling based on this data alone. The Commission then proceeded to examine Customs invoices for price data, as well as to obtain information on relative prices and wholesale prices—all of which supported the ITC's conclusion that Canadian imports generally did not undersell domestic potatoes. Thus, the Commission properly used the best available information.

Plaintiff also argues that before comparing Canadian prices to domestic prices, the ITC should have subtracted the additional transportation costs and duties from Canadian prices. When comparing the price of United States goods with the price of imports, the Commission must compare prices at the level of actual competition in the United States market. *British Steel Corp.*, 593 F. Supp. at 412. Actual market price would include transportation costs for Canadian and Maine potatoes, as well as the ordinary duty for Canadian potatoes.[10]

D. *Quality Differences.* A final basis for attacking the Commission's decision, plaintiff argues, is that the Commission, after finding that the perceived higher quality of the Canadian imports contributed to the effectiveness of the Canadian product, did not properly consider quality differences when evaluating lost sales data, price suppression, and underselling. The Commission is not required to make a perfect statement as to the reasons for its determination. Absent some showing to the contrary, the Commission is presumed to have considered all evidence in the record. *Rhone Poulenc* v. *United States*, 8 CIT ——, 592 F. Supp. 1318, 1326 (1984). If the Commission's opinion, when read as a whole, is supported by substantial evidence, it must stand. *See Sprague Electric Co.*, 2 CIT at 310, 529 F. Supp. at 682. Here, however, the Commission found quality to be a factor contributing to the competitiveness of the Ca-

[9] The court is not seeking the use of some magic words. Because of factors to be discussed in section "D" *infra*, there is considerable doubt in the court's mind as to what the Commission will conlcude on remand.

[10] Of course, proper adjustment must be made for the effects of these proceedings, if any such effects exist.

nadian imports. Thus, quality was found to be a significant factor. Nonetheless, it is not clear from the Commission's opinion how the Commission treated the issue of quality differences when evaluating price suppression, price comparisons, and lost sales and whether that treatment was proper.

Defendant's counsel conceded at oral argument the possibility that the Canadian imports, notwithstanding their higher price, could theoretically have had a price suppressing effect on domestic prices due to the perceived higher quality of the imports, but counsel argued this factor was properly considered and accounted for. In addition, perceived quality differences were said to have been considered in the Commission's price comparisons in its inquiry into underselling. Counsel's *post hoc* rationalization cannot substitute for a clear statement by the Commission as to how it treated quality differences.

Plaintiff also argued that the comparison improperly disregarded lost sales due to quality factors.[11] There is no statutory provision which requires the Commission to perform a particular type of analysis in order to draw a conclusion regarding lost sales per se. Although the Commission must assess the impact of imports on the domestic industry, the Commission may make such an evaluation on whatever rational basis it chooses. Here the Commission used lost sales to determine if sales were lost due to price factors, an important test of injury.[12] What is of concern in regards to the lost sales analysis is what the Commission did after it concluded that sales were being lost because of quality factors, and that quality factors were important to the competitiveness of Canadian potatoes.[13] At that point the Commission was compelled to treat this factor, particularly in regards to its analysis of price suppression. With regard to underselling, it is not clear that a consistently significant quality difference should not or could not be quantified.

Since the Commission's findings on price suppression and underselling appear crucial to its decision, the Commission must clarify the basis for such findings. *See SCM Corp.* v. *United States*, 84 Cust. Ct. 227, C.R.D. 80-2 (1980), *aff'd*, 2 CIT 1, 519 F Supp. 911 (1981), *reaff'd*, 4 CIT 7, 544 F. Supp. 194 (1982).

Accordingly, the ITC is instructed to explain how it treated the issue of quality differences when finding no price suppression by reason of LTFV imports and no underselling and how such findings led to the final decision regarding injury. If the Commission did not consider quality differences previously, it should do so now. In addition, the Commission shall state whether it finds overall that im-

[11] Out of nineteen allegations of lost sales investigated by the Commission, "almost none" were due to a lower Canadian price. A number of buyers, however, stated that they purchased Canadian potatoes because of higher quality.

[12] Certain affidavits indicated that sales were lost because of price. The ITC could not confirm the statements in the affidavits and exercised its discretion in disregarding them.

[13] This case is factually distinguishable from *Jeanette Sheet Glass Corp.* v. *United States*, 9 CIT ——, 607 F. Supp. 123 (1985), *appeal docketed* No. 85-2455 (Fed. Cir. May 24, 1985), wherein quality was not found to be a consistently significant factor.

ports were a contributing cause of injury and how that finding relates to data on volume effects. The Commission's opinion on remand will be delivered to this court and plaintiff no later than July 25, 1985. Plaintiff may respond by delivering papers to this court and to defendant no later than August 5, 1985. Defendant may reply by delivering its papers to this court and to plaintiff no later than August 15, 1985.

(Slip Op. 85–70)

CAN-AM CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT and INDUSTRIAS QUIMICAS DE YUCATAN, S.A., INTERVENOR

Court No. 84–10–01411

Before DICARLO, *Judge.*

MEMORANDUM OPINION AND ORDER

Intervenor challenges the jurisdiction of the Court to review under 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (1982) part of an action contesting a negative part of a decision by the International Trade Administration (ITA) to initiate a countervailing duty investigation. Intervenor argues that the ITA decided "not to initiate an investigation" of a subsidy, and that under section 1516a(a)(1)(A) plaintiffs should have challenged that decision within thirty days after publication.

Held: The ITA decided "to initiate an investigation". Negative aspects of an affirmative decision to begin a countervailing duty investigation may be challenged after publication of an affirmative countervailing duty order.

[Intervenor's motion to sever and dismiss part of the complaint is denied.]

(Decided June 28, 1985)

Squire, Sanders & Dempsey (Ritchie T. Thomas and *William D. Kramer),* for the plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Platte B. Moring, III*), for the defendant.

Brownstein, Zeidman and Schomer (David R. Amerine and *Irwin P. Altschuler),* for the defendant-intervenor.

DICARLO, *Judge:* Intervenor moves to sever and dismiss on jurisdictional grounds parts of plaintiffs' complaint contesting the International Trade Administration's (ITA) decision not to investigate an alleged first-level fuel oil subsidy (fuel subsidy)[1] provided to

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[1] Plaintiffs contend that the government of Mexico provides the heavy fuel oil used by Mexican lime producers to fire their kilns at a price that is about one-eighth of the market value of the fuel. Plaintiffs argue that fuel and power account for about 60% of the cost of producing lime, and that this practice confers an enormous subsidy on the Mexican lime industry.

Mexican lime producers. Defendant joins plaintiffs in opposing the motion.

In March 1984, plaintiffs, domestic lime producers and unions representing lime industry workers, filed a countervailing duty petition with the ITA alleging that the government of Mexico gives manufacturers, producers, and exporters of lime "bounties or grants" within the meaning of section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1982), and requested that countervailing duties be imposed on imports of lime from Mexico.

In April 1984, the ITA began an investigation of seventeen programs and decided not to investigate four others, including the fuel subsidy. 49 Fed. Reg. 15,011 (Apr. 16, 1984).

In September 1984, the ITA published a final affirmative countervailing duty determination and order. The ITA stated that it did not investigate the fuel subsidy "because it has previously been found not to confer a bounty or grant, and petitioners did not allege new facts to justify a review of this finding." *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Lime from Mexico,* 49 Fed. Reg. 35,672, 35,677 (Sept. 11, 1984).

Plaintiffs brought this action under 19 U.S.C. § 1516a(a)(2)(A)(i)(II) [2] within thirty days of publication of the countervailing duty order. Plaintiffs challenge six parts of the final affirmative determination, including the ITA's failure to investigate the fuel subsidy.

The question presented by the motion is whether the ITA's April 1984 decision not to initiate a fuel subsidy investigation was a final determination under section 1516a(a)(1)(A) that had to be challenged within thirty days of its publication in the Federal Register.[3]

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[2] Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a (1982), providing for judicial review in countervailing duty proceedings, was amended by the Trade and Tariff Act of 1984 (1984 Trade Act), Pub. L. 98-573, § 623(a), 98 Stat. 2948, 3040 (1984). The amendments made the 1984 Trade Act apply with respect to civil actions pending on October 30, 1984. 1984 Trade Act, § 626(b)(2), 98 Stat. at 3042. This action was initiated on October 11, 1984, and is, therefore, governed by the 1984 Trade Act.

19 U.S.C. § 1516a(a)(2) provides for review:

(A) In general.—Within thirty days after—

(i) the date of publication in the Federal Register of—

* * * * * * *

(II) An antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B)

* * * * * * *

(B) Reviewable determinations.—The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).

[3] Intervenor analogizes to *Republic Steel v. United States,* 4 CIT 17 (1982), which held that a preliminary finding that a particular program is not a subsidy was a "negative determination", which may be appealed interlocutorily under 19 U.S.C. § 1516a(a)(1)(B)(ii), *repealed by* 1984 Trade Act § 623a, 98 Stat. at 3040-41. The Court found preliminary determinations under the former section 1671b(b) to be made up of a "series of discreet and severable determinations." 4 CIT at 19.

Republic Steel is inapposite to the issue before this Court because: the provision heavily relied upon by the Court in *Republic Steel* as demonstrating Congressional intent to allow interlocutory appeals, the former section 1516a(a)(1)(B), was repealed by the 1984 Trade Act; the vitality of the holding may be questioned in light of *Bethlehem Steel Corp. v. United States,* 742 F. 2d 1405, 1411 (Fed. Cir. 1984) and; plaintiffs challenged a preliminary determination under section 1671b, not a decision to initiate an investigation under section 1671a.

Reviewable under Section 1516a(a)(1)(A) [4] is a determination not to initiate an investigation under 19 U.S.C. 1671a(c) (1982). Section 1671a(c) provides in part:

> Within 20 days after the date on which a petition is filed * * * the administering authority shall—
>
> * * * * * * *
>
> (2) if the determination is affirmative, commence an investigation to determine whether a subsidy is being provided with respect to the class or kind of merchandise described in the petition, and provide for the publication of notice of the determination to commence an investigation in the Federal Register, and
>
> (3) *if the determination is negative, dismiss the petition, terminate the proceeding,* notify the petitioner in writing of the reasons for the determination, and provide for the publication of notice of the determination in the Federal Register.

(Emphasis added).

The plain meaning of the provision contemplates a single affirmative determination to begin or a negative determination not to begin an investigation with respect to the class or kind of merchandise described in the petition.

In this case, the petition was not dismissed or the proceeding terminated. Rather, the ITA published a notice titled *Lime from Mexico: Initiation of Countervailing Duty Investigation,* 49 Fed. Reg. 15,011. The ITA's refusal to investigate the fuel subsidy was not a negative determination within the meaning of section 1671a(c)(3) but a negative part of an affirmative determination to commence an investigation pursuant to section 1671a(c)(2).

Since review under 19 U.S.C. § 1516a(a)(1)(A) requires a determination not to initiate an investigation, review was not available to the plaintiff under that section in April 1984.

Congress provided for review of any negative part of final affirmative determinations within thirty days after publication in the Federal Register of the final duty order. 19 U.S.C. § 1516a(a)(2)(A)(i)(II).

If there was any doubt as to whether an appeal from negative parts of an affirmative determination was permissible, Congress resolved it when it set forth as among the purposes of the 1984 Trade Act:

> (1) *Eliminat[ion of] all interlocutory judicial review by the U.S. Court of International Trade during the course of CVD*

[4] 19 U.S.C. § 1516a(a) provides in part:

(1) Within 30 days after the date of publication in the Federal Register of—

(A) a determination by the administering authority, under section 1671a(c) * * * of this title, not to initiate an investigation * * *.

Intervenor contends that the ITA's decision not to investigate this subsidy may not be reviewed under 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and that the Court lacks jurisdiction pursuant to 28 U.S.C. § 1581(c) over that part of plaintiff's complaint challenging this decision.

[*countervailing duty*] *and AD* [*antidumping*] *investigations. All challenges to agency determinations would be combined and reviewable by the court after final agency action has been taken* [and the]

(2) Clarifi[cation of] when negative portions of affirmative determinations may be reviewed: any part of a final affirmative determination by the administering authority which specifically excludes any company or product may, at the option of the appellant, be treated as a final negative determination; and may be subject to appeal within 30 days of publication; *other negative aspects of an affirmative determination would be appealable within 30 days after publication of a final order* * * *.

H. Rep. No. 1156, 98th Cong., 2d Sess. 178–79 (1984) (emphasis added).

The Court finds Congress clearly expressed its intention to permit judicial review of negative parts of affirmative determinations after publication of a final duty order, except for those final determinations excluding a company or product. Prior judicial review would be "interlocutory" and premature. Were the Court to require plaintiffs to appeal negative parts of a decision to initiate an investigation before issuance of the duty order, petitioners would have to prosecute an appeal and participate in an ongoing administrative proceeding at the same time. This is contrary to the intent of Congress.

Even before enactment of the 1984 Trade Act, Congress preferred all challenges to an administrative proceeding to be brought at one time. Under the Trade Agreements Act of 1979, which permitted some interlocutory appeals, a plaintiff was permitted to wait until the countervailing duty order to challenge negative aspects of affirmative determinations pursuant to 19 U.S.C. § 1671d (1982). *See Bethlehem Steel Corp. v. United States*, 742 F.2d 1405, 1411 (Fed. Cir. 1984). Under the 1979 Act, Congress permitted interlocutory appeals only where delay "could make an ultimate resolution of an issue in a party's favor irrelevant because of the irreversible damage suffered during the interim period." S. Rep. No. 249, 96th Cong., 1st Sess. 245 (1979). *See Bethlehem, supra.*

Plaintiffs have followed the statutory scheme. The motion is denied. So ordered.

ABSTRACTED PROTEST

Decision number	Judge & Date of Decision	Plaintiff	Court No.	Assessed
				Item No. and rate
P85/130	Carman, J. June 11, 1985	J.C. Penny Purchasing Corp.	84-3-00432	Not stated
P85/131	Carman, J. June 14, 1985	Alfa-Laval Inc.	83-3-00330	Item 661.35 4.5% or 4.2%
P85/132	Carman, J. June 14, 1985	Alfa-Laval Inc.	83-3-00486	Item 661.35 4.7%, 4.5% or 4.2%
P85/133	Carman, J. June 14, 1985	Alfa-Laval Inc.	83-5-00752	Item 661.35 4.7%, 4.5% or 4.2%
P85/134	Carman, J. June 14, 1985	Alfa-Laval Inc.	83-5-00753	Item 661.35 4.7%, 4.5% or 4.2%
P85/135	Carman, J. June 14, 1985	Applied Motion Products, Inc.	81-8-01103	Item 685.25 11.8%
P85/136	Carman, J. June 14, 1985	Barco International Corp.	80-7-01114	Item 405.15 Various rates
P85/137	Carman, J. June 14, 1985	D.S.G., Inc.	84-8-01186	Item 700.57 37.5%

OTEST DECISIONS

rate	Held Item No. and rate	Basis	Port of entry and merchandise
	Item 684.70 6.5% or 6.2%	Judgment on the pleadings	San Francisco, New York Headphones
%	Item 870.40 Free of duty	Agreed statement of facts	Detroit Bulk milk coolers or farm tanks
7%, %	Item 870.40 Free of duty	Agreed statement of facts	Buffalo Bulk milk coolers or farm tanks
or	Item 870.40 Free of duty	Agreed statement of facts	Buffalo Bulk milk coolers or farm tanks
or	Item 870.40 Free of duty	Agreed statement of facts	Buffalo Bulk milk coolers or farm tanks
	Item 685.30 5.8%	Agreed statement of facts	San Francisco Stepper motors
es	Item A405.15 Free of duty	Agreed statement of facts	San Diego Fungicide, not artificially mixed, known as Pentaclor-onitrobenzene, or PCNB
	Item 700.56 6%	Agreed statement of facts	Miami "Moon Boots" footwear

P85/138	Carman, J. June 14, 1985	Orit Imports, Inc.	83-8-01210	Duties assessed in the amount of $5,000.62	I
P85/139	Carman, J. June 14, 1985	Picker Corp.	83-8-01196	Item 413.51 19.3%	I
P85/140	Carman, J. June 14, 1985	Western Service Center	83-1-00104	Item 716.10-716.29 Various rates for items marked A Item 720.20, 720.24, 720.28, or 740.35 Various rates for items marked B	I
P85/141	Re, C.J. June 17, 1985	Belcrest Linens	80-2-00264, etc.	Item 363.01, 363.05, 363.25, 365.78, 365.82, 365.85, or 365.86 at 90%, the column 2 rate	I I
P85/142	Ford, J. June 17, 1985	Korea Manufacturing Corp.	83-10-01437, etc.	Not stated	C

d in of	No customs duties payable	Agreed statement of facts	New York Wearing apparel, which was directly exported from bonded warehouse
	Item 432.25 4.5%	Agreed statement of facts	St. Albans, Vermont Micropaque powder
6.29 s	Item 688.36 5.5%, 5.3%, or 5.1% for items marked A and B	U.S. v. Texas Instruments, Inc., 673 F.2d 1375 (1982)	Los Angeles Electronic watch modules, items marked A Electronic watches which consist of watch modules, cases and bands, items marked B
8, or s			
5, 2, 5.86 e	Item 363.01, 363.05, 365.78, 365.82, 365.85, or 365.86 at 34%, the column 1 rate Item 363.25, 42.5%, the column 1 rate	Belcrest Linens v. U.S., 741 F.2d 1368 (1984)	New York Bedding, furnishings, linens, pillowcases, bed sheets, table cloths, quilt covers, etc.
	676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982)	San Juan Plastic film ribbons Multi-strike, etc.

ABSTRACTED PROTEST DECIS

Decision number	Judge & Date of Decision	Plaintiff	Court No.	Assessed	
				Item No. and rate	It
P85/143	Carman, J. June 18, 1985	Casio, Inc.	82-7-01064	Item 720.20, 720.24 or 720.28, 740.35 Various rates for items marked B Item 676.20 Various rates for items marked C, except for watch module portion Item 676.20 Various rates for items marked D	It It
P85/144	Re, C.J. June 19, 1985	American Microsystems, Inc.	80-9-01424	Item 720.75 22.5% Item 720.86 Various rates	It

DECISIONS—Continued

ate	Held Item No. and rate	Basis	Port of entry and merchandise
.24 .35 tch n	Item 688.36 5.1% for items marked Band D Item 676.20 4.7% for items marked C	U.S. v. Texas Instruments, Inc., 673 F.2d 1375 (1982)	Chicago Electronic watches, items marked B Electronic desktop or hand-held calculators with watch functions items marked C Electronic wrist watches with calculator functions, items marked D
	Item 687.60 6%	U.S. v. Texas Instruments, Inc., C.A.D. 1244	San Francisco Watch or clock assemblies or subassemblies

P85/145	Re, C.J. June 19, 1985	Pretty Tops Inc.	78-11-01921, etc.	Item 382.78, 382.04, 382.81, 382.33, and 382.00 with an allowance given under 807.00 for the cost or value of some of the fabric components which were the product of the U.S. and utilized in assembling the imported merchandise—no allowance under 807.00 for fabric components, product of U.S., subjected to buttonhole and/or pocket slit operations during assembly of imported garments.
P85/146	Re, C.J. June 20, 1985	Federated Equipment Co.	82-5-00735, etc.	Item 676.60 7.5%, 7.1%, 6.8% or 6.4%
P85/147	Watson, J. June 20, 1985	Terumo America, Inc.	83-7-01081, etc.	Item 709.27 11.7%, 13%, 14.2% or 15.5%
P85/148	Carman, J. June 24, 1985	Daystar International Inc.	84-10-01518, etc.	Assessed with duty based on a degree of concentration of 4.5

	Fabric components, the product of the U.S., subjected to buttonhole and/or pocket slit operations afforded duty allowance under 807.00	Agreed statement of facts	Miami Wearing apparel
	Item 674.70 4.5%, 4.3%, 4%, or 3.8%	Lukas American, Inc. v. U.S., S.O. 84–55	Chicago Cutters, spreaders or parts therefor
	Item 709.09 4.9%, 5.1%, 5.3%, or 5.6%	Terumo Corp. v. U.S., S.O. 84–86	Los Angeles Catheters
	Degree of concentration is 4.0 as calculated pursuant to schedule 1, part 12, subpart A, headnote 4, TSUS	Agreed statement of facts	New York Concentrated grape juice

ABSTRACTED REAPPRA

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R85/257	Rao, J. June 11, 1985	HB&L	79–12–01974, etc.	Export value
R85/258	Watson, J. June 11, 1985	D.H. Sigal & Co.	276505A, etc.	Export value
R85/259	Watson, J. June 11, 1985	Getz Bros.	R61/23144	Export value for items marked A and B
R85/260	Watson J. June 11, 1985	Gunze New York Inc.	R61/3163	Export value
R85/261	Watson, J. June 11, 1985	Kaysons International Ltd.	R64/17012, etc.	Export value for items marked A and B

PPRAISEMENT DECISIONS

OF ON	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Appraised values less 28.5%	Hensel, Bruckmann & Lorbacher, 735 F.2d 1340 (1984)	New York Industrial sewing machine needles
	Appraised values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Binoculars, etc.
or d A	F.o.b. unit invoice prices as shown in entry documents, plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed items marked A Appraised unit values less 7.5% thereof, net packed, items marked B	Agreed statement of facts	Philadelphia Plumbing supplies, malleable pipe fittings
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk piece goods
or d A	F.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed, items marked A Appraised unit values less 7.5% thereof, net packed, items marked B	Agreed statement of facts	Portland, Oreg. Chinaware and porcelainware

R85/262	Carman, J. June 11, 1985	Daewoo Int'l America Corp.	79-9-01393, etc.	American selling price	A
R85/263	Rao, J. June 13, 1985	HB&L	83-11-01619	Export value	A
R85/264	Restani, J. June 13, 1985	Brown Shoe Co.	81-12-01641	American selling price	A
R85/265	Restani, J. June 14, 1985	Jimlar Corp.	81-7-00927	American selling price Export value	$ E F
R85/266	Re, C.J. June 17, 1985	Starlight Trading, Inc.	73-8-02369, etc.	Export value	A
R85/267	DiCarlo, J. June 18, 1985	F.W. Myers & Co.	81-11-01558	Transaction value	T
R85/268	Watson, J. June 19, 1985	Kalimar Inc.	282026-A	Export value	A
R85/269	Watson, J. June 19, 1985	Michelin Tire Corp.	83-6-00877	Countervailing duties	1
R85/270	Rao, J. June 20, 1985	Hensel, Bruckmann & Lorbacher	79-12-01847, etc.	Export value	A
R85/271	Watson, J. June 20, 1985	Michelin Tire Corp.	81-9-01151	Countervailing duties	1
R85/272	Watson, J. June 20, 1985	Michelin Tire Corp.	82-7-00969	Countervailing duties	1

Appraised values less 10%, net packed	Agreed statement of facts	New York, Los Angeles Various styles of athletic footwear
Appraised values less 28.5%	Hensel, Bruckmann & Lorbacher, 785 F.2d 1340 (1984)	New York Industrial sewing machine needles
Appraised values less 10%, net packed	Agreed statement of facts	Los Angeles Various styles of athletic footwear
$10.00 per pair, net packed Invoiced unit values Refund to plaintiff is 50% of differences in above duties	Agreed statement of facts	New York Men's footwear
Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Co.rp., C.D. 4739	New York Los Angeles
F.o.b. mill price as identified on the commercial invoices	Agreed statement of facts	Detroit Not stated
Appraised values as shown on entry documents, less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Binoculars
I.26	Agreed statement of facts	Norfolk Michelin x-radial steel belted tires
Appraised values less 28.5%	Hensel, Bruckmann & Lorbacher, 785 F.2d 1340 (1984)	New York Industrial sewing machine needles
I.26	Agreed statement of facts	Los Angeles, New York Michelin x-radial steel belted tires
I.26	Agreed statement of facts	Detroit, Los Angeles Michelin x-radial steel belted tires

ABSTRACTED REAPPRAISEMENT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
R85/273	Watson, J. June 20, 1985	Michelin Tire Corp.	82-9-01316	Countervailing duties	1.26
R85/274	Watson, J. June 20, 1985	New Home Sewing Machine Co.	R64/8058, etc.	Export value for items marked A and B	F.o.b 20 tw pr va App 7.5
R85/275	Watson, J. June 21, 1985	New York Merchandise Co.	R64/8965	Export value	F.o.b pl be vo pr
R85/276	Watson, J. June 21, 1985	S. Shamash & Sons, Inc.	R85/11226, etc.	Export value	F.o.b pl be an
R85/277	Watson, J. June 21, 1985	S. Shamash & Sons, Inc.	R58/19023, etc.	Export value	F.o.b pl be an
R85/278	Watson, J. June 21, 1985	S. Shamash & Sons, Inc.	R59/1053, etc.	Export value	F.o.b pl be an
R85/279	Watson, J. June 24, 1985	A. Ferer & Co.	R66/4661	Export value	App on 7.5

ENT DECISIONS—Continued

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	1.26	Agreed statement of facts	Detroit, Norfolk Michelin x-radial steel belted tires
	F.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, items marked A Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Philadelphia Sewing machines
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice price, and appraised values	Agreed statement of facts	San Francisco Transistor radios, together with their accessories and parts
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit price and appraised values	Agreed statement of facts	New York Silk fabrics
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
	Appraised values as shown on entry documents, less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Batteries

R85/280	Watson, J. June 24, 1985	Bruce Duncan Co.	R63/7789	Export value	F
R85/281	Watson, J. June 24, 1985	Kaysons International, Ltd.	R66/2854	Export value	F
R85/282	Watson, J. June 24, 1985	Mundo Corp.	R61/15192	Export value	A
R85/283	Watson, J. June 24, 1985	New Home Sewing Machine Co.	R66/17996, etc.	Export value	F
R85/284	Watson, J. June 24, 1985	Quality Marble Granite Co.	R64/17867	Export value	A
R85/285	Watson, J. June 24, 1985	S. Shamash & Sons, Inc.	R58/8845	Export value	F
R85/286	Watson, J. June 24, 1985	S. Shamash & Sons, Inc.	R58/8878, etc.	Export value	F
R85/287	Watson, J. June 24, 1985	S. Shamash & Sons, Inc.	R58/20756, etc.	Export value	F
R85/288	Watson, J. June 24, 1985	S. Shamash & Sons, Inc.	R58/21157, etc.	Export value	F

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	Los Angeles Flatware
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Mobile Pipe fittings
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	Lacksonville Sewing machines
Appraised unit values as shown on entry documents, less 7.5% thereof, net packed	Agreed statement of facts	Savannah Ceramic title
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
F.o.b unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics

ABSTRACTED REAPPRAISEMENT I

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
R85/289	Watson, J. June 24, 1985	S. Shamash & Sons, Inc.	R58/23001, etc.	Export value	F.o.b. plu bet and

U.S. GOVERNMENT OFFICE : 1985 O - 478-995

ENT DECISIONS—Continued

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics

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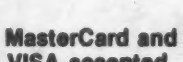

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Quantity	Charges
_____ Publications	_____
_____ Subscriptions	_____
Special Shipping Charges	_____
International Handling	_____
Special Charges	_____
OPNR	_____
_____ UPNS	
_____ Balance Due	
_____ Discount	
_____ Refund	

ZIP Code

982

GPO 856-916

Index

U.S. Customs Service

U.S. Court of International Trade

CB SERIA300SDISSDUE016R 1
SERIALS PROCESSING DEPT
UNIV MICROFILMS INTL
300 N ZEEB RD
ANN ARBOR MI 48106